85-1232

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

CHRIS STAMOS, INDIVIDUALLY AND AS NEXT FRIEND OF NICKY STAMOS, A MINOR, ET AL.,
Appellants

v.

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellees

JURISDICTIONAL STATEMENT
and Appendices
On Appeal from the Supreme Court of Texas

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QUESTIONS PRESENTED BY THIS APPEAL

This action relates to the validity of Section 21.920 of the Texas Education Code and the related Administrative Rule adopted by the Texas Education Agency, 19 Texas Administrative Code 97.113. The statute and rule work to suspend a public school child from, or bar a child's entry into any "extracurricular activity" sponsored by the involved public school, should the child earn less than a grade of 70 (on a scale of 100) in one or more classes in a six week grading period. A child may make all "A's" but one "F" (grade below 70) and be barred, but a child with all "D's" but no grade below 70 can participate at his or her pleasure. The law and rule also suspend or bar such a child should the child not be promoted or not receive a given number of credits, as set forth specifically in the Administrative Rule. All public school children in the state are covered in grades 1-12. These are the so called "no pass, no play," laws of Texas. The extracurricular activities barred by the challenged laws involve the exercise of First Amendment Rights, such as Student Government, Debate Teams, Literary Clubs, the School Newspaper, etc. and the laws facially do not apply solely to football or athletics. Furthermore, the laws contained no exceptions for certified mentally handicapped public school students other than "mentally retarded" students. Certified handicapped students are protected from such discrimination by Federal law. There are no exceptions for a child's grave illness or other family tragedy. An "incomplete" is an "F" under the rule. Furthermore, as patently stated in the law, the principal in each public school, in each school district in Texas is granted the unbridled discretion to wholly waive the laws application in certain instances. No criteria is given for

this waiver other than a statutory definition of "honors courses." The Texas Supreme Court had no power to judge "facts" in the case. The U.S. Supreme Court is not so delimited.

1. Is the challenged statute unconstitutional as it violates the Plaintiffs' and the class' rights to due process of law and equal protection of the law under the U.S. Constitution?
2. Is the challenged statute unconstitutional as it violates the Plaintiffs' and the class' rights to freedom of speech and freedom of association under the United States Constitution?
3. Is the challenged statute unlawful under the Federal law as it discriminates against mentally handicapped members of the Plaintiff class?
4. Is the challenged statute unlawful as it violates the Federal Civil Rights statute?
5. Is the challenged statute unlawful as it violates the ex post facto clause of the United States Constitution? The challenged rule went into effect on April 5, 1985 and attempted to suspend students for the low grades earned 5 weeks prior to that date. See Exhibit 5 for the effective date, etc. in the Appendix.
6. Is the challenged statute unconstitutional as it violates certain penumbra rights emanating from the United States Constitution, such as family privacy, association, etc.

LIST OF INTERESTED PARTIES

Pursuant to Rule 15.1(b),Rules of the Supreme Court, counsel for Appellants certifies that the following is a complete list of all parties in the proceeding in the Court whose judgment is sought to be reviewed and, additionally, all parties and persons believed to be directly interested in the outcome of this action:

1. Chris Stamos and son, Nicky Stamos.
2. Barry Bruce and son, Gregg Bruce.
3. James Roberts and son, Richard Roberts.
4. Lorene Meyer and son, Troy Meyer.
5. Harry Bruder and son, Chris Bruder.
6. John Autenreith and son, John Autenreith, Jr.
7. John Owens and son, Peter Owens.
8. Robert Dorris and son, Eric Dorris.
9. Charles Bagett and daughter, Dee Bagett.
10. James Hayes and son, Tim Hayes.
11. Bruce Howard and son, Roy Howard.
12. Lela Arnes and son, Nolan Arnes (Handicapped 10-year old child).
13. Donald Tidwell and son, Monty Tidwell.
14. Kenneth Patterson and daughter, Lori Patterson.
15. All public school children in Texas (the class has been certified).
16. The State of Texas and Texas Education Agency.
17. The Spring Branch I.S.D.

18. The Alief I.S.D.
19. The Klein I.S.D.
20. The University Interscholastic League.
21. All public school districts in the State of Texas (the class of defendants has been certified).

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(All Texas Cases relate to the "Law of the Case doctrine.)

IN THE

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NO. _____

CHRIS STAMOS, INDIVIDUALLY AND AS NEXT FRIEND OF NICKY STAMOS, A MINOR, ET AL.,
Appellants

v.

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellees

JURISDICTIONAL STATEMENT
and Appendices
On Appeal from the Supreme Court of Texas

To the Honorable Supreme Court of the United States:

CHRIS STAMOS and his son, NICKY STAMOS, et al. respectfully request the Court to note jurisdiction of this appeal and to review the Opinion and Judgment of the Texas Supreme Court, and to thereafter reverse that decision and reinstate the ruling of the District Court and remand the cause to the lower courts for all actions not inconsistent therewith.

OPINIONS BELOW

1. The Opinion of the 334th District Court of Texas signed and entered on May 23, 1985, is not reported. (see Appendix)

2. The Opinion of the Texas Supreme Court is reported in (see Appendix) 695 S.W.2d 556 (July 10, 1985).

STATEMENT OF JURISDICTION

Appellants seek to review the Opinion and Judgment of the Texas Supreme Court, under date of September 26, 1985. Statutory jurisdiction is conferred under Title 28 U.S.C., § 1257, (2). Plaintiffs challenged the validity of a Texas Statute under the Constitution and laws of the United States, and the Texas Supreme Court upheld the statute.

The judgment of the Texas Supreme Court will become the "law of this case" if not appealed, and is "final" as set forth in *Cox Broadcasting*, 95 S. Ct. 1029 (1975); *National Party*, 97 S. Ct. 2205 (1977); *American Motorist*, 96 S. Ct. 1800 (From Texas, 1976). Also see *McKenzie Const. Co. v. San Antonio*, 115 S.W.2d 617 (Tex. 1938); *Frankland v. Cassady*, 62 Tex. 418; 6 Tex. Jur. 3d pp. 386-395 "Law of the Case."

CONSTITUTIONAL STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

1. United States Constitution, Amendment I, provides relevantly that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

2. United States Constitution, Amendment XIV, provides relevantly that no ". . . State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . liberty or property, without due process of law; nor deny to any person . . . equal protection of the laws.

3. Title 42, U.S.C. Section 1983 (see Appendix).

4. Article I, Section 9 of the United States Constitution, the "ex post facto" clause.

5. Section 21.920 Texas Education Code (see Appendix).

6. 19 Texas Administrative Code 97.113 (see Appendix).

7. Education For All Handicapped Children Act 20 U.S.C. 1401. (Appendix).

8. 34 C.F.R. 300.306 and 34 C.F.R. 300.553 (Appendix).

9. 29 U.S.C. 794 (Appendix).

STATEMENT OF THE CASE

This is a class action suit seeking a permanent injunction against the enforcement of the so-called "no pass, no play" law of Texas, and the minor Plaintiffs and their parents, for themselves and the class, sought the usual temporary injunctive relief pending final hearing of the cause. The challenged statute and related administration rule suspend a child from participation in *any* school sponsored extracurricular activity for at least a six-week period, should the child earn less than a grade of 70 in one or more classes. If a child is not a participant in such an activity, the child is barred from entry into such an activity for the stated period. Some of the activities are directly related to graded courses conducted during the school day, such as debate, journalism, typing, music (symphony, chorus, band), art, narrative writing, etc., and exclusion from such extracurricular activities patently affects the grade received by the excluded child in the graded course.

As shown in the transcript, the case was filed on April 25, 1985 and the District Court issued a Temporary Restraining Order on that date, without notice, restraining the Spring Branch and Alief Independent School Districts from enforcing the challenged statute (Section 21.920, Texas Educational Code), rule (19 Texas Administrative Code 97.113) and related policies of the districts, against the minor Plaintiffs until a hearing could be had upon Plaintiffs' Motion to certify the class and temporary injunction.

The Attorney General of Texas and the Texas Education Agency voluntarily intervened and appeared for all purposes in this action on or about May 3, 1985, pursuant to Rule 60, T.R.C.P., as shown in their pleadings in the transcript.

The Temporary Retsraining Order was duly extended by the Court on May 6, 1985, after a hearing thereon attended by the State's attorney and the attorney for the Spring Branch I.S.D. as well as the Plaintiffs' attorney, and the School Districts continued to be so restrained until the hearing on Plaintiffs' Motion for Temporary Injunction which had been set for May 15, 1985.

On May 10, 1985, the Plaintiffs, for the reasons stated in their related sworn motion, sought and received a Temporary Restraining Order without notice, restraining the Texas Education Agency and the U.I.L. from enforcing the challenged statute, rules and related policies of those agencies (which included Section 400 of the U.I.L. Constitution) until the Plaintiffs' Motion for Temporary Injunction could be heard before the Court on May 15, 1985. In support thereof, Plaintiffs thereafter filed their supplemental Petition seeking temporary and permanent

injunctive relief against the Texas Education Agency and the U.I.L. for generally the same reasons and on the same general basis as their original suit against the two defendant school districts.

Insofar as the numbered causes consolidated with this cause are concerned, the District Court found that those suits involve minor Plaintiffs and their parents affected by the enforcement actions of the Klein I.S.D. and Aldine I.S.D. of Harris County, and that said suits relate to the same challenged statute, rules and related District policies and issues involved in the Stamos case.

The temporary Restraining Orders entered in the consolidated cases, were granted by other District Courts in Harris County, but were transferred to the 334th District Court for hearing on the pending motions for temporary injunctions and were then consolidated by the agreed order of the District Court. Accordingly, all evidence, including the testimony of witnesses in the cause at bar, applies to all the consolidated causes, and the parties thereto have stipulated with each other that the testimony of their witnesses would have been essentially comparable in all legal respects to the testimony and other evidence adduced through the parents and local school officials in the Stamos case, had there been separate injunctive hearings in each of the consolidated causes.

The temporary injunction hearing relevant hereto began on May 15, 1985 and all parties rested on Friday, May 17, 1985. The Honorable District Court entered the Temporary Injunction forming the subject of this appeal on May 23, 1985, after extensive oral arguments by the parties on May 22, 1985.

Appellants have "standing" to raise all of the issues at bar which are *fundamental* in nature. The trial court, through its broad powers in equity, was empowered to preserve the status quo for the *class* as well as for the named Plaintiffs, where there had been no discovery in the newly filed case, and where there was abundant time to address and certify the class action aspects of the case in proper detail in the due course of the pending and ongoing case. The trial court rightfully found that the Plaintiffs will probably prevail on the merits (which includes the class action). Based upon the pleadings and the unchallenged evidence, protection of the class via the Courts interlocutory injunction is proper, and the protected class facially contains normal children involved in the myriad extracurricular activities in issue, as well as mentally handicapped children so involved—(in the Spring Branch, Alief and Klein Districts). Appellants duly complained of the *unbridled discretion* given school principals under the statute and rule, and undisputed evidence was introduced on that point. The Texas Supreme Court *deflected* that issue wrongfully, by stating that "extracurricular" endeavors are not "property," but such activities are clearly valuable educational endeavors for the most part.

The Defendants appealed the temporary injunction to the Texas Supreme Court as allowed in such circumstances, and on July 11, 1985 the State Supreme Court reversed the Trial Court through published opinion. The Texas Supreme Court's judgment became final on September 26, 1985 and notice of appeal was duly filed, therein by Appellants on October 7, 1985.

"No Pass, No Play" is essentially a deceptive phrase, apparently adopted for promotional reasons by the various interests involved with the passage of the challenged statute. The phraseology is untruthful because the un-

disputed evidence has revealed that the law works to deprive all public school children in Texas, falling within its purview, from participation in *all* extracurricular activities sponsored by the individual schools, whether or not the activities indeed involve "play," or some other much more meaningful educational activity. The case patently does not involve the media favorite, "academics vs. athletics." The State would have it so, however, because that characterization serves their purposes.

The Plaintiffs, and the class of students they represent, are minors and the statute and rules in question are essentially penal in nature, therefore, the challenged law must be strictly construed as to effect, purview, and viability, in lieu of being leniently construed with liberal presumptions, as could otherwise be the case. There is no question that most of the students deprived of their various extracurricular activities by the State's action would rather pay a heavy monetary fine or receive physical punishment than be deprived of such varied educational endeavors. This is so, notwithstanding the State's euphemistic characterization of the statute and rule as creating "incentives" or a "carrot and stick." The punitive aspects of the measures are clear.

As the Appellants well know, many of the minor Plaintiffs in the class have been deprived, and shall be deprived, of organized activities that are in no way "recreational" in nature, such as sporting-type activities, but in fact involve intellectual, purely educational pursuits which entail heavily protected Constitutional rights, i.e., journalistic work on the school newspaper; Student Government; Journalism Club; Student Orchestra; Christian Student Union (CSU); Drama Club; Choir; Fine Arts Club; Vocational Training Clubs; German Club; Spanish

Club; Speech Club; Computer Club and Drafting Club, etc.

It may be arguable that some of these endeavors are not as important as "reading, writing and arithmetic," but if a good student were to fail one course, i.e., "Basket Weaving I," such student would be deprived of participating in Student Government as a candidate or from extracurricular work upon the school newspaper, and many other sensitive academic endeavors. All of this is undisputed in the testimony, and is readily apparent from the definitions contained in the rule of "extracurricular activities." The six week suspension is so long that the affected child is usually removed from the endeavor for the school year, as many of the activities, especially the contests, are *seasonal* in nature. For example, the band and debate contests, typing contests, etc. occur in a 2 to 3 week period in the spring.

"When the constitutionality of a school regulation is questioned, *it is settled law that the burden of justifying the regulation falls upon the school board.*" (emphasis added) *Shanley v. Northwest I.S.D., Bexar County, Texas,* 462 F.2d 960 (5th Circuit 1972). The State has no scientific data or special studies whatever to justify its arbitrary and capricious actions, and the State testified that this law is an *"experiment."*

The State of Texas has not and cannot justify the patent impingment of First Amendment rights in this case. The passage of the statute and rule had nothing to do with a vital State interest such as school discipline and is based admittedly upon the nonempirical "hope" that learning might be improved among those students wishing to engage in "extracurricular activities." The "hope" of

the statute is not rationally related to the proven harsh results of the law upon thousands of public school children in every county in Texas, and the punishment it inflicts will cause a regression of academic achievement within the class of students engaged in such activities *who indisputably, as a group, maintain a grade average far in excess of the non-participating students.*

Section 21.290, Texas Education Code, facially bars Texas public school students caught in its grip from participating in extracurricular activities directly entailing the exercise of First Amendment Rights, i.e., student government, the school newspaper, the debate squad, etc. The State of Texas *admitted* in its Brief and during numerous oral arguments that various extracurricular activities from which students are barred under the rule entail such protected rights. Therefore, the Honorable Texas Supreme Court is clearly in error in its conclusion that ". . . the no pass, no play rule neither infringes upon fundamental rights nor burdens an inherently suspect class, and we hold that it is *not* subject to 'strict' or heightened equal protection scrutiny." *All* of the cases cited by the Honorable Court to support its conclusions in this regard relate basically to *athletic* or more recreational extracurricular activities. The Federal Court decisions indicate extracurricular activities relating to athletic endeavors do not involve First Amendment rights; however, the Honorable Texas Supreme Court's opinion patently upheld the challenged law as applied to *all* related activities. Several categories of these activities in Texas would directly and clearly involve the exercise of fundamental rights under the United States and Texas Constitutions. Public school students do not shed their First Amendment rights at the public school house gate.

Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733 (1969); *Sullivan v. Houston I.S.D.,* 307 F. Supp. 1328, opinion supplemented 333 F. Supp. 1149, vacated on other grounds, 475 F.2d 1071, rehearing denied 475 S. Ct. 1404 (5th Circuit), cert. denied 94 S. Ct. 461. Moreover, the athletic activities this Honorable Court chose to disclothe of any constitutional protection are partially conducted during regular school periods for which a meaningful grade point is received. The Court's decision in this regard is not, only a harmful precedent as to a meaningful school activity, but will cause havoc in the administration of academic achievement and student evaluation.

Under the challenged law straight "D" students may take part in any such extracurricular endeavors. A student with all "A's" and one "F" in Basket Weaving can take part in no such endeavors whatsoever. This planned result from the law's patent overbreadth is arbitrary and capricious and is not rationally related to the alleged ends sought by the statute and rule. Furthermore, the statute and rules trammel the minors' fundamental constitutional rights, as above described in a facially overbroad manner. There is no compelling State interest that can justify the broad, damaging purview of the statute and rule.

The statute and rule also burden an inherently suspect class of public school children, namely the certified handicapped children suffering from learning disabilities.

As constitutional issues are *fundamental* in nature, the Honorable Court may consider any such defects in the subject statute and rules, whether or not such issues were directly addressed in the Honorable District Court's injunctive order.

We have reviewed relevant portions of the Legislative Journals and much of the "History of H.B. 72" discussed by the State, and none of such materials indicate any significant discussion of the constitutional implications of the challenged laws insofar as the school children of Texas are concerned.

STATEMENT OF IMPORTANCE

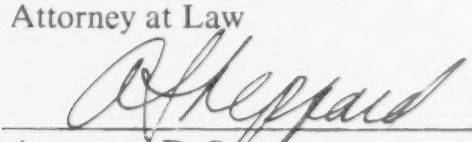
This case affects all 3,000,000 plus public school children in Texas, and shall affect all future public school children in Texas. The fundamental constitutional rights of minors and handicapped minors permeate the case, and are so substantial that plenary consideration, briefs on the merits and oral arguments shall be required. The trial court has now certified the class of plaintiffs in the case as all public school children in the State, with all public school districts as class defendants. If this appeal is not maintained the Texas Supreme Court's opinion will become the "law of the case" for several purposes, though the trial on the full merits has begun in Houston, Texas, but is in recess at this time.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellants request that the Honorable Supreme Court note jurisdiction to review the Opinion and Judgment of the Texas Supreme Court, and to thereafter, in due course, reverse the cause and remand same to the Courts below for all actions not inconsistent therewith.

Respectfully submitted,

ANTHONY D. SHEPPARD
Attorney at Law

By: 

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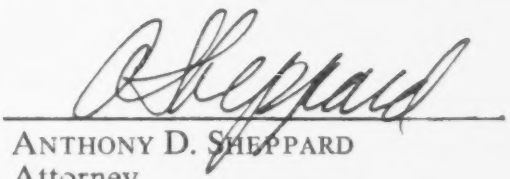
Attorneys for Appellants and the Class of Plaintiffs

CERTIFICATE OF SERVICE

The undersigned attorney of record for Appellants hereby certifies that he has on the 27th day of December, 1985, deposited a true copy of the foregoing Jurisdictional Statement and the Appendices in the United States mail, certified, return receipt requested to each attorney of record for Appellees.



ANTHONY D. SHEPPARD
Attorney

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

CHRIS STAMOS, INDIVIDUALLY AND AS NEXT FRIEND OF NICKY STAMOS, A MINOR, ET AL.
Appellants

v.

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, ET AL.
Appellees

APPENDIX FOR JURISDICTIONAL STATEMENT

On Appeal From The Supreme Court of Texas

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APPENDIX

Note: This case is now being tried on the merits in Houston, Texas (Trial in recess now), but the Texas Supreme Court's Judgment will become the law of the case if not appealed. Discrimination against minority children is now an issue in the case, but this issue will only arise in an appeal in the near future.

A. The "final judgment" of the Texas Supreme Court dated September 26, 1985 with opinion.

B. The Temporary Injunction of the 334th District Court of Houston, Harris County, Texas.

C. Appellants' Notice of Appeal filed with the Texas Supreme Court on October 7, 1985.

D. The challenged statute, Section 21.920, Texas Education Code.

E. The challenged administrative rule, 19 Texas Administrative Code 97.113.

F. The text of 42 U.S.C.A. 1983.

G. The text of 29 U.S.C.A. 794.

H. The text of the "Education of the Handicapped Act," 20 U.S.C.A. 1400, 1401.

I. The text of 300.306 and 300.553 Code of Federal Regulation (nondiscrimination in extracurricular activities).

J. Class Action Certification in On Going Case.

K. Emergency Discovery Order in On Going Case.

APPENDIX A

FINAL JUDGMENT

THE SUPREME COURT OF TEXAS
P.O. Box 12218 Capitol Station
Austin, Texas 78711

September 26, 1985

Mr. Ray Hardy
Harris County District Clerk
Civil Courts Building
Houston, TX 77002

RE: SPRING BRANCH I.S.D. ET AL.

v.

CHRIS STAMOS, INDIVIDUALLY a/n/f OF NICKY STAMOS ET AL.

No. C-4184 in the Supreme Court of Texas

No. 85-25201 in the 334th District Court, Harris County

Dear Mr. Hardy:

The judgment of the Supreme Court of Texas is now final in the above referenced cause.

As Rule 507, Texas Rules of Civil Procedure, has been satisfied, we have issued the mandate as of this date.

Enclosed with the mandate is a certified copy of our cost bill showing the charges and payments as reflected

by the record for your use in settlement between the parties.

Very truly yours,

MARY M. WAKEFIELD, Clerk

By: /s/ PEGGY HODGES
Peggy Hodges, Chief Deputy

Encl. Mandate w/Opinion
Cost Bill

THE STATE OF TEXAS

To the District Court of Harris County, Greeting:

Before our Supreme Court on the 10th day of July, A.D. 1985, the Cause, upon writ of error, to revise or reverse your judgment between Spring Branch I.S.D. et al. v. Chris Stamos, Individually and a/n/f of Nicky Stamos et al. No. C-4184 in the Supreme Court of Texas., No. 85-25201 in the District Court of Harris (334th) County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

"This cause was heard on direct appeals from the district court of Harris County, Texas. The record, briefs and arguments of counsel were considered.

"It is the opinion of the court (authored by Justice C. L. Ray) there is error in the judgment of the trial court which held that a provision of the Texas Education Code was unconstitutional.

"In accordance with the opinion of this court, it is ordered that:

1) because a student's right to participate in extracurricular activities is not a fundamental right under our constitution, no violation of due process results. Therefore, the judgment of the trial court is reversed, and the termporary injunction dated May 23, 1985 in case No. 85-25201 entitled: CHRIS STAMOS, INDIVIDUALLY AND AS NEXT FRIEND OF NICKY STAMOS, A MINOR, ET AL., v. SPRING BRANCH I.S.D. AND ALIEF I.S.D. in the 334th District Court of Harris County is dissovled.

2) Chris Stamos, Individually, and as next friend of Nicky Stamos, a minor et al. shall pay the costs in this court.

"A copy of this judgment with a copy of the opinion shall be certified to the 334th District Court of Harris County, Texas for observance."

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness the Honorable John L. Hill, Jr., Chief Justice of our said Supreme Court, with the seal thereof annexed at the City of Austin, this the 26th day of September, A.D. 1985.

MARY M. WAKEFIELD, Clerk

By: /s/ PEGGY HODGES
Peggy Hodges, Chief Deputy.

IN THE SUPREME COURT OF TEXAS

NO. C-4184

SPRING BRANCH I.S.D., ET AL.,
Appellants,

v.

CHRIS STAMOS, INDIVIDUALLY AND A/N/F OF NICKY STAMOS, ET AL.,
Appellees

Direct Appeal from Harris County

This is a direct appeal brought by the Attorney General, representing the Texas Education Agency, and others, seeking immediate appellate review of an order of the trial court which held unconstitutional, and enjoined enforcement of, a provision of the Texas Education Code. This court has jurisdiction over this cause pursuant to Tex. Const. art. V, § 3-b and Tex. Rev. Civ. Stat. Ann. art. 1738a (Vernon Supp. 1985). We hold that the statutory provision is not unconstitutional and reverse the judgment of the trial court.

Chris Stamos and others brought this suit on behalf of Nicky Stamos and others, seeking a permanent injunction against enforcement of the Texas "no pass, no play" rule by the Spring Branch and Alief Independent School Districts. The Texas Education Agency and the University Interscholastic League intervened. The district court issued a temporary restraining order and later, after a hearing, a temporary injunction enjoining all parties from enforcing the rule. This court issued an order staying the district court's order and setting the cause for expedited review.

THE "NO PASS, NO PLAY" RULE

The Second Called Session of the 68th Legislature adopted a package of educational reforms known as "H.B. 72." Act of July 13, 1984, Chapter 28, 1984 Tex. Gen. Laws, 2nd Called Session 269. A major provision of these educational reforms was the so-called "no pass, no play" rule, which generally requires that students maintain a "70" average in all classes to be eligible for participation in extracurricular activities. *See* Tex. Educ. Code Ann. § 21.920(b) (Vernon Supp. 1985). The rule is incorporated in section 21.920 of the Texas Education Code and provides as follows:

> § 21.920. Extracurricular Activities
>
> (a) The State Board of Education by rule shall limit participation in and practice for extracurricular activities during the school day and the school week. The rules shall, to the extent possible, preserve the school day for academic activities without interruption for extracurricular activities. In scheduling those activities and practices, a district must comply with the rules of the board.
>
> (b) A student, other than a mentally retarded student, enrolled in a school district in this state shall be suspended from participation in any extracurricular activity sponsored or sanctioned by the school district during the grade reporting period after a grade reporting period in which the student received a grade lower than the equivalent of 70 on a scale of 100 in any academic class. The campus principal may remove this suspension if the class is an identified honors or advanced class. A student may not be suspended under this subsection during the period in which school is recessed for the summer or during the initial grade reporting period of a regular school

term on the basis of grades received in the final grade reporting period of the preceding regular school term.

(c) In this section, "mentally retarded" has the meaning assigned by Section 21.503(b)(5) of this code.

(d) Subsection (b) of this section applies beginning with the spring semester, 1985.

ISSUES RAISED

The sole issue before this court is the constitutionality of the no pass, no play rule. The district court held the rule unconstitutional on the grounds that it violated equal protection and due process guarantees. The burden is on the party attacking the constitutionality of an act of the legislature. *Texas Public Building Authority v. Mattox,* 686 S.W.2d 924, 927 (Tex. 1985). There is a presumption in favor of the constitutionality of an act of the legislature. *See Sax v. Votteler,* 648 S.W.2d 661, 664 (Tex. 1983).

This court has long recognized the important role education plays in the maintenance of our democratic society. Article VII of the Texas Constitution "discloses a well-considered purpose on the part of those who framed it to bring about the establishment and maintenance of a comprehensive system of public education, consisting of a general public free school system and a system of higher education." *Mumme v. Marrs,* 120 Tex. 383, 40 S.W.2d 31, 33 (1931). Section 1 of article VII of the Constitution establishes a mandatory duty upon the legislature to make suitable provision for the support and maintenance of public free schools. 40 S.W.2d at 36. The Constitution leaves to the legislature alone the determination of which

methods, restrictions, and regulations are necessary and appropriate to carry out this duty, so long as that determination is not so arbitrary as to violate the constitutional rights of Texas' citizens. *Id.*

Equal Protection

Stamos challenges the constitutionality of the "no pass, no play" rule on the ground that it violates the equal protection clause of the Texas Constitution. The first determination this court must make in the context of equal protection analysis is the appropriate standard of review. When the classification created by a state regulatory scheme neither infringes upon fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate state interest. *Sullivan v. University Interscholastic League,* 616 S.W.2d 170, 172 (Tex. 1981). Therefore, we must first detremine whether the rule burdens an inherently suspect class or infringes upon fundamental rights or interests.

The no pass, no play rule classifies students based upon their achievement levels in their academic courses. We hold that those students who fail to maintain a minimum level of proficiency in all of their courses do not constitute the type of discrete, insular minority necessary to constitute a "suspect" class. *See United States v. Carolene Products Co.,* 304 U.S. 144, 152 n. 4 (1938). Thus, the rule does not burden an inherently "suspect" class.

Stamos urges that the rule discriminates against another suspect class, i.e., students with learning disabilities. However, this claim is made on behalf of a person who was

not a party to the lawsuit at the time the trial judge signed her order or even at the time this court stayed the injunction and set the cause for argument. Furthermore, the claim is made against a new defendant who was not a party before the district court. By adding new parties, appellees are now attempting to vary their theory of the case. "Parties are restricted in the appellate court to the theory on which the case was tried in the lower court." *Safety Casualty Co. v. Wright,* 138 Tex. 492, 160 S.W.2d 238, 245 (1942). Therefore, the issue concerning students with learning disabilities is not properly before this court.[1]

Stamos also argues that the rule is subject to strict scrutiny under equal protection analysis because it impinges upon a fundamental right, i.e., the right to participate in extracurricular activities. We note that the overwhelming majority of jurisdictions have held that a student's right to participation in extracurricular activities does *not* constitute a fundamental right. *See, e.g., Hardy v. University Interscholastic League,* 759 F.2d 1233, 1235 (5th Cir. 1985); *Walsh v. Louisiana High School Athletic Ass'n,* 616 F.2d 152, 160-61 (5th Cir. 1980); *Pennsylvania Interscholastic Athletic Ass'n, Inc. v. Greater Johnstown School District,* 76 Pa. Commw. 65, 463 A.2d 1198, 1202 (Pa. Commw. Ct. 1983); and *Smith v. Crim,* 240 Ga. 390, 240 S.E.2d 884, 885 (1977).

Stamos cites the case of *Bell v. Lone Oak Independent School District,* 507 S.W.2d 636 (Tex. Civ. App.—

---

1. The legislature recently enacted an amendment to the no pass, no play rule, effective September 1, 1985, providing an exemption for learning disabled and all handicapped students. *See* Tex. H.B. 1731, Acts of the 69th Leg., Reg. Sess. (1985) [to be codified at Tex. Educ. Code Ann. § 21.920 (Vernon Supp. 1986)].

Texarkana), *writ dism'd,* 515 S.W.2d 252 (Tex. 1974) for the proposition that students have a fundamental right to participate in extracurricular activities. In *Bell,* a school regulation prohibited married students from participating in extracurricular activities. Because the regulation impinged upon the fundamental right of marriage, the court of appeals held the regulation subject to strict scrutiny and struck it down because the school district had shown no compelling interest to support its enforcement. 507 S.W.2d at 638-39. The presence of a fundamental right (marriage) distinguishes *Bell* from the present cause.

Fundamental rights have their genesis in the express and implied protections of personal liberty recognized in federal and state constitutions. A student's "right"to participate in extracurricular activities does not rise to the same level as the right to free speech or free exercise of religion, both of which have long been recognized as fundamental rights under our state and federal constitutions. We adopt the majority rule and hold that a student's right to participate in extracurricular activities *per se* does *not* rise to the level of a fundamental right under our constitution.

Because the no pass, no play rule neither infringes upon fundamental rights nor burdens an inherently suspect class, we hold that it is *not* subject to "strict" or heightened equal protection scrutiny. Rather, the rule must be judged by the standard set forth in *Sullivan v. UIL.* In *Sullivan,* this court struck down on equal protection grounds the U.I.L.'s non-transfer rule, which declared all non-seniors ineligible for varsity football and basketball competition for one year following their transfer to a new school. This court emphasized (1) the overinclusiveness of the rule in light of its intended purpose

of discouraging "recruitment" of student-athletes, and (2) the irrebuttable presumption created by the rule. *Sullivan,* 616 S.W.2d at 172-73. In view of these two factors, this court declared that the rule was *not* rationally related to its intended purpose. *Id.*

The no pass, no play rule distinguishes students based upon whether they maintain a satisfactory minimum level of performance in each of their classes. Students who fail to maintain a minimum proficiency in all of their classes are ineligible for participation in school-sponsored extracurricular activities for the following six-week period, with no carry over from one school year to the next. The rule provides a strong incentive for students wishing to participate in extracurricular activties to maintain minimum levels of performance in all of their classes. In view of the rule's objective to promote improved classroom performance by students, we find the rule rationally related to the legitimate state interest in providing a quality education to Texas' public school students. The rule does not suffer from either of the vices found determinative in *Sullivan v. UIL.*

The distinctions recognized in the rules for mentally retarded students and students enrolled in honors or advanced courses likewise do not render the rule violative of the equal protection guarantees of the Texas Constitution. While the statute itself does not deprive students of their right to equal protection of the law, we recognize that the discretion given to school principals in the rule's provision dealing with honors or advanced courses may well give rise to arbitrary or discriminatory application violative of equal protection principles. *See Yick Wo v. Hopkins,* 118 U.S. 356 (1886). We are faced with no allegations of discrimina-

tory application of the rule's honors exception in the present case.

Procedural Due Process

We begin our analysis of the due process arguments in this cause by recognizing that the strictures of due process apply only to the threatened deprivation of liberty and property interests deserving the protection of the federal and state constitutions. *Tarrant County v. Ashmore*, 635 S.W.2d 417, 422 (Tex. 1982), *cert. denied*, 459 U.S. 1038 (1982); *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976); and *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). The federal courts have made it clear that the federal constitution's due process guarantees do not protect a student's interest in participating in extracurricular activities. *See Niles v. University Interscholastic League*, 715 F.2d 1027, 1031 (5th Cir. 1983); *Mitchell v. Louisiana High School Athletics Ass'n*, 430 F.2d 1155, 1158 (5th Cir. 1970); *see also, Hamilton v. Tennessee Secondary School Athletic Ass'n*, 552 F.2d 681, 682 (6th Cir. 1976); and *Albach v. Odle*, 531 F.2d 983, 984-85 (10th Cir. 1976). We must, then, examine our state constitution to determine whether its due process guarantees extend to a student's desire to participate in school-sponsored extracurricular activities.

A property or liberty interest must find its origin in some aspect of state law. *See Board of Regents v. Roth*, 408 U.S. at 577-78. Nothing in either our state constitution or statutes entitles students to an absolute right to paricipation in extracurricular activities. We are in agreement, therefore, with the overwhelming majority of jurisdictions that students do not possess a constitutionally protected interest in their participation in extracurricular

activities. *See, e.g., Caso v. New York State Public High School Athletic Ass'n, Inc.*, 78 A.D.2d 41, 434 N.Y.S. 2d 60, 64 (N.Y. App. Div. 1980); *Menke v. Ohio High School Athletic Ass'n*, 2 Ohio App. 3d, 441 N.E.2d 620, 624 (Ohio Ct. App. 1981); *Whipple v. Oregon School Activities Ass'n*, 52 Or. App. 419, 629 P.2d 384, 386 (Or. Ct. App. 1981); *Adamek v. Pennsylvania Interscholastic Athletic Ass'n, Inc.*, 57 Pa. Commw. 261, 426 A.2d 1206, 1207 n. 1 (Pa. Commw. Ct. 1981); and *Bailey v. Truby*, 321 S.E.2d 302, 314-15 (W.Va. 1984). Therefore, the strictures of procedural due process do *not* apply to the determination by a campus principal, pursuant to section 21.920(b) of the Texas Education Code, as to whether a student who fails an identified honors or advanced course shall be permitted to participate in extracurricular activities.

Substantive Due Process

Stamos cites *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513 (1921), to support his argument that the rule violates principles of fundamental fairness and notions of substantive due process by giving school principals discretion to determine whether students who fail honors or advanced courses may participate in extracurricular activities. *Compare Moore v. City of East Cleveland*, 431 U.S. 494, 502-03 (1977). In *Spann*, this court declared void a city ordinance that required persons seeking to construct commercial buildings within residential areas to first obtain the consent of both neighboring residents and the city building inspector. There, we found that the ordinance provided no standards for builders or building inspectors with regard to the proper design for such buildings. 235 S.W. at 517. By

leaving the approval for such buildings "subject to the arbitrary discretion of the inspector," the ordinance violated the would-be builders' property right to use their property as they saw fit. *Id.* This court emphasized that the ordinance in *Spann* infringed upon well-recognized property rights by permitting wholly arbitrary limitations upon the uses which owners could make of their property. *Id.* at 514-15.

In the present case, appellees liken the school principals' unfettered discretion in determining both which classes shall constitute "advanced" or "honors" courses and whether students failing such classes may participate in extracurricular activities to the building inspectors' unfettered discretion over approving commercial building plans. *Spann* is distinguishable for the obvious reason that a recognized property interest was affected by the Dallas ordinance. As stated previously, students have no constitutionally protected interest in participation in extracurricular activities. Because no constitutionally protected interest is implicated by this delegation of authority to school principals, no violation of due process, substantive or procedural, results therefrom.

We do not agree with Stamos' argument that a school principal's exercise of discretion pursuant to the "honors" exception to the rule is shielded from all review. Arbitrary, capricious, or discriminatory exercise of a school principal's discretion pursuant to subsection 21.920(b) of the Texas Education Code may well give rise to claims based upon equal protection grounds. *See Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Accreditation audits of schools and school districts may also afford relief against improper utilization of the "honors" exception. We also note there

are no findings of fact before us that any of the student-plaintiffs received failing grades in honors or advanced courses.

Finally, Stamos argues that because the no pass, no play rule did not become effective until April 5, 1985, it was applied in an *ex post facto* manner to the students involved in this case. We choose not to address this issue, because we have no findings of fact before us relating to the circumstances surrounding the application of the rule to any of the concerned students. We note that the district court has yet to address this issue.

Accordingly, we reverse the district court's judgment with regard to the constitutionality of section 21.920 of the Texas Education Code and dissolve the temporary injunction ordered by the district court.

C. L. RAY
Justice

OPINION DELIVERED. July 10, 1985

APPENDIX B

TEMPORARY INJUNCTION

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334th Judicial District
Houston, Texas

CAUSE NO. 85-25201

CHRIS STAMOS, INDIVIDUALLY, AND AS
NEXT FRIEND OF NICKY STAMOS,
A MINOR, ET AL.,
Plaintiffs

v.

SPRING BRANCH I.S.D.
AND ALIEF I.S.D.,
Defendants

HARPOLD, McDONALD & FITZGERALD
Lew W. Harpold, Attorney
Anthony D. Sheppard, Attorney
For Plaintiffs, Chris Stamos, et al.

W. ROBERT BROWN,
Attorney Ad Litem
For the Minor Plaintiffs

REYNOLD, ALLEN & COOK
Jeffrey Davis, Attorney
For the Defendant, Spring Branch
Independent School District

BRACEWELL & PATTERSON
Timothy Cooper, Attorney
For Defendant, Alief Independent
School District

ATTORNEY GENERAL JIM MATTOX
KEVIN T. O'HANLON, Assistant Attorney General
Joan Allan, Attorney
For the Texas Education Agency

Connie O'de, Attorney
For the University Interscolastic League (U.I.L)

CAUSES CONSOLIDATE HEREWITH:

FORMERLY CAUSE NO. 85-26764

SHARON WOODRING, Individually, and as next friend of CRAIG WOODRING, A MINOR, ET AL.,
Plaintiffs

ROBERT B. HINSLEY,
Attorney for the Plaintiffs

v.

KLEIN I.S.D., ET AL.,

JOHN WUNDERLICK
Attorney for the Klein I.S.D.

A N D

FORMERLY CAUSE NO. 85-25368

JOHN O'DONNELL, ET AL.

JACK B. ZIMMERMAN,
Attorney
RANDALL B. CLARK,
Attorney for the Plaintiffs

v.

ALDINE I.S.D. AND UNIVERSITY INTERSCOLASTIC LEAGUE

JONATHAN C. HANTKE,
Attorney for Aldine I.S.D.

TEMPORARY INJUNCTION

On the 15th day of May, 1985, the Application of Plaintiffs for a Temporary Injunction was presented to the Court, and herein appeared Plaintiffs, CHRIS STAMOS, individually, and as next friend of NICKY STAMOS, a minor; BARRY BRUCE, individually, and as next friend of GREGG BRUCE, a minor; JAMES ROBERTS, individually, and as next friend of RICHARD ROBERTS, a minor; LORENE MEYER, individually, and as a next friend of TROY J. MEYER, a minor; HARRY BRUDER, individually, and as next friend of CHRIS H. BRUDER, a minor; JOHN AUTENREITH, individually, and as next friend of JOHN AUTENREITH, JR.; JOHN OWENS, individually, and as next friend of PETER OWENS, a minor; ROBERT DORRIS, individually, and as next friend of ERIC DORRIS, a minor; and BRUCE HOWARD, individually, and as next friend of RON HOWARD, a minor, on their own behalf and on behalf of all similarly situated students of Spring Branch Independent School District; and CHARLES BAGETT, indi-

vidually, and as next friend of DEE BAGETT, a minor; and JAMES HAYES, individually, and as next friend of TIM HAYES, a minor, on their own behalf and on behalf of all similarly situated students of Alief Independent School District, Plaintiffs, all with their attorney of record and Defendants, Spring Branch I.S.D. and Alief I.S.D., the State of Texas, and the Texas Education Agency, and the University Interscholastic League (U.I.L.) having been duly notified of this hearing and having duly appeared herein, through their respective attorneys above set forth, and the Court having appointed W. Robert Brown as attorney ad litem for the minor Plaintiffs as above named, and said attorney having so appeared herein in behalf of said parties, and all parties hereto having announced ready, the Court proceeded to hear the application of Plaintiffs for a temporary injunction and related motions; and the said hearing having been continued from day to day until all parties had rested on Friday, May 17, 1985, and the Court, having considered the evidence, affidavits, arguments of counsel and pleadings has determined and finds the following:

FINDINGS OF FACT

1. This is a suit seeking class action certification and a permanent injunction in connection with House Bill 72, Section 1, Art. IV, Part F, and the minor Plaintiffs and their parents sought temporary injunctive relief for themselves and the class pending final hearing of the cause.

2. Insofar as the numbered causes consolidated with thus cause are concerned, the Court finds that those suits involve minor Plaintiffs and their parents affected by the enforcement actions of the Klein I.S.D. and Aldine I.S.D. in Harris County, other than the Alief and Spring Branch

Districts, and that those suits relate to the same challenged statute and issues involved in this cause.

3. All parties stipulated that all evidence, including the testimony of witnesses in this cause applies to all the consolidated causes, and the parties thereto have stipulated with the Defendant that the testimony of the witnesses would have been essentially comparable in all legal respects to the testimony and other evidence adduced through the parents and local school officials in their causes had there been separate hearings on each of the consolidated causes.

4. This Court has jurisdiction of this suit for injunctive relief and venue is proper in Harris County, Texas.

5. The Court finds:

Plaintiff, Nicky Stamos, age 17 years, is a student attending Spring Branch I.S.D., and made a 69 in Geometry which suspended him from playing in Spring Football for the 6th Six-week period.

Plaintiff, Eric Dorris, age 16 years, is a student attending Spring Branch I.S.D., and made a 67 in Spanish which suspended him from symphonic band for the 6th Six-week period.

Plaintiff, Tim Hayes, age 17 years, is a student attending Alief I.S.D., and made a 68 in Alegbra III which suspended him from Spring Football for the 6th Six-week period.

Plaintiff, Dee Bagett, age 17 years, is a student attending Alief I.S.D., and made a 68 in English and a 65 in Mathematics which suspended her from track for the 6th Six-week period.

Plaintiff, Ron Howard, age 16 years, is a student attending Spring Branch I.S.D., and made a 61 in Physical Science which suspended him from Spring Football for the 6th Six-week period.

Plaintiff, Peter Owens, age 17 years, is a student attending Spring Branch I.S.D., and made a 68 in Mathematics which suspended him from orchestral band for the 6th Six-week period.

Plaintiff, John Autenreith, Jr., age 16 years, is a student attending Spring Branch I.S.D., and made a 66 in Algebra I which suspended him from Track Team and Spring Football Practice for the 6th Six-week period.

Plaintiff, Troy Meyer, age 17 years, is a student attending Spring Branch I.S.D., and made a 68 in Algebra III which suspended him from Spring Football for the 6th Six-Week period.

Plaintiff, Chris Bruder, age 17 years, is a student attending Spring Branch I.S.D., and made a 67 in English which suspended him from Spring Football for the 6th Six-week period.

Plaintiff, Richard Roberts, age 16 years, is a student attending Spring Branch I.S.D., and made a 68 in Geometry which suspended him from Spring Basketball for the 6th Six-week period.

Plaintiff, Gregg Bruce, age 17 years, is a student attending Spring Branch I.S.D., and made a 66 in Spanish which suspended him from Spring Football for the 6th Six-week period.

6. Section 21.920, Texas Education Code, is Section 1 of Article IV "PART F. EXTRACURRICULAR ACTIVITIES" of H.B. 72 (so specifically designated ac-

cording to H.B. 72, 68th Legislature—Second Called Session, page 269-459, Volume 12 Vernons Texas Session Law Service). This Section became effective for the purposes of this suit on September 1, 1984, and no other portion of House Bill 72 is at issue in this cause. Section 2 of "Part F" of House Bill 72 relates to the University Interscholastic League Rules.

7. Section 21.920, Texas Education Code, contains parts designated (a), (b), (c) and (d). The relationship between the two major parts, (a) and (b) is not perfectly clear. Part (a) appears to generally mandate the State Board of Education to limit participation in and practice for "extracurricular activities during the school day and school week." Part (b) is more specific and mandates student suspensions from any extracurricular activities for the reasons stated.

8. The words "extracurricular activity" are not defined by the Section and the statute left that duty to the State Board of Education.

9. The Court finds that extracurricular activities are valuable educational activities.

CONCLUSIONS

1. Promotion of high academic standards in our public schools constitutes a legitimate interest of the State of Texas.

2. The statute deprives the minor Plaintiffs of their participation in the varied extracurricular activities, of freedom of association with their peers, personal and family privacy and the right of private family discipline.

3. Part (b) of Section 21.920, Texas Education Code, says in relevant part "The campus principal may remove

this suspension if the class is an identified honors or advanced class."

4. The Court concludes that House Bill 72, Section 1, Article IV, Part F is invalid and unenforceable.

5. Accordingly Section 21.920, Texas Education Code, is unconstitutional and therefore void.

6. The action of the Defendants pursuant to House Bill 72, Section 1, Article IV, Part "F", Texas Education Code 21.290, impinged upon the protected rights of the minor Plaintiffs and is not rationally related to the State's professed purpose in promulgating House Bill 72, Section 1, Article IV, Part "F", Texas Education Code, to provide a negative or positive incentive to improve the students' education.

7. There are at least two classifications created by House Bili 72, Section 1, Article IV, Part "F":

(1) those who participate in extracurricular activity.

(2) those who do not participate in extracurricular activity.

The first classification, those who participate in extracurricular activity, are affected by the statute in various ways, and there are subclassifications created by the statute within the first classification. They are:

(a) students who take honors or advanced courses.

(b) students who do not take honors or advanced courses.

8. Advanced or honors courses are not uniform as to such designation (i.e. what may be an honors or advanced

course in one school district may not be such in another school district) throughout Texas.

9. Those who take honors or advanced courses are subject to the unguided discretion of the school principal as to whether they may participate in extracurricular activity should they make below seventy (70) in an honors or advanced course.

10. A grade below seventy (70) in any course suspends a student from participation in any extracurricular activity. The grade of sixty-eight (68) in Geometry prevents the student from participating in band practice and concerts, an extracurricular activity. As a result, the grade in band, which is in part based upon the student's performance at the practices and concerts, is adversely affected by the application of the statute.

11. Section 400 of the U.I.L. Constitution is unenforceable as to these Plaintiffs as it is in direct parimateria with the stricken statute, Section 21.920, Texas Education Code.

NOW, THEREFORE, the Court finds that the Plaintiffs who are students of the Spring Branch Independent School District, the Alief Independent School District, the Klein Independent School District, and the Aldine Independent School District are similarly situated insofar as suspension from extracurricular activities and practice are concerned, are entitled to a temporary injunction and that unless the Spring Branch Independent School District the Alief Independent School District, the Klein Independent School District, the Aldine Independent School District, the State of Texas, the Texas Education Agency, and the University Interscholastic League are immediately enjoined from the commission of the acts hereinafter pro-

hibited, Plaintiffs will suffer immediate and irreparable injury, loss and damages through deprivation of the relevant protected educational and competitive entitlements to participate in the described school sponsored or sanctioned extracurricular activities, events and contests for which they have long worked and which the Court finds are valuable educational entitlements. Such protected rights cannot be replaced at a later date and the Defendants probably have immunity from the award of damages in State Court.

This order maintains the last peaceful status quo among the parties that existed before the dispute arose, and the Court may lose jurisdiction of the relevant events if the status quo is not maintained hereby. The Plaintiffs will probably prevail on the merits. The Court has balanced the equities involved, and found that the Defendants will not be greatly harmed by the effects of this order, but if this order is not granted, the Plaintiffs shall be irreparably harmed.

The Spring Branch Independent School District, the Alief Independent School District, the Klein Independent School District, the Aldine Independent School District, the State of Texas, the Texas Education Agency, and the University Interscholastic League (U.I.L.), their respective commissioner and director, their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them be and are hereby enjoined and restrained from enforcing or applying House Bill 72 Section 1, Article IV, Part F (so specifically designated according to H.B. 72, 68th Legislature—Second Called Session, page 269-459, Volume 12 Vernons Texas Session Law Service), Section 21.920, Texas Education Code, and Section 400 of the University Interscholastic League

Constitution in any way directly or indirectly including intimidating the students by threats or innuendo.

The trial on the merits in this cause is set for hearing before this Court at 10:00 o'clock a.m. on June 28, 1985.

Plaintiffs shall post a bond in the amount of $2,000.00 in this cause and said posted bond shall under all of the circumstances inure to the benefit of all Defendants herein.

IT IS ORDERED that the Attorney Ad Litem W. Robert Brown, shall be paid the reasonable and necessary sum of $3,000.00 as fees for his legal services in representing the minor Plaintiffs in this cause and further the reasonable and necessary sum of $7,500.00 shall be paid to the Attorney Ad Litem for his services in representing the minor Plaintiffs in any appeal of this cause. The total amount of said fees, $10,500.00, shall be paid to the Attorney Ad Litem, W. Robert Brown. The fee of $3,000.00 shall be paid on or before 5:00 p.m. June 3, 1985, by the following parties in the following amounts:

Chris Stamos	$187.50
Barry Bruce	$187.50
James Roberts	$187.50
Lorene Meyer	$187.50
Harry Bruder	$187.50
John Autenreith	$187.50
John Owens	$187.50
Robert Dorris	$187.50
Bruce Howard	$187.50
Charles Bagett	$187.50
James Hayes	$187.50
Spring Branch I.S.D.	$187.50
Alief I.S.D.	$187.50
Texas Education Agency	$187.50
University Interscholastic League	$187.50
State of Texas	$187.50

The fee for appeal, $7,500.00, shall be paid to W. Robert Brown on or before 5:00 p.m. the tenth day following the filing of any notice of appeal to the Court of Civil Appeals or the Supreme Court, said sum to be paid by the following parties in the following amounts:

Chris Stamos	$468.75
Barry Bruce	$468.75
James Roberts	$468.75
Lorene Meyer	$468.75
Harry Bruder	$468.75
John Autenreith	$468.75
John Owens	$468.75
Robert Dorris	$468.75
Bruce Howard	$468.75
Charles Bagett	$468.75
James Hayes	$468.75
Spring Branch I.S.D.	$468.75
Alief I.S.D.	$468.75
Texas Education Agency	$468.75
University Interscholastic League	$468.75
State of Texas	$468.75

The fees for the Attorney Ad Litem are assessed as costs.

SIGNED THIS 23rd day of May, 1985.

By: /s/ MARSHA ANTHONY
Judge Marsha Anthony
334th Judicial District Court
Harris County, Texas

State of Texas
County of Harris

I, Ray Hardy, District Clerk of Harris County, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, as appears of record in Vol. 3016, Page 175 Minutes of said court on file in my office.

Witness my official hand and seal of office, this May 23, 1985.

RAY HARDY, District Clerk
Harris County, Texas

By: /s/ N. Ayres, Deputy
N. Ayres

APPENDIX C

NOTICE OF APPEAL

Harpold, McDonald & Fitzgerald
Attorneys at Law
One Greenway Plaza East, Suite 820
Houston, Texas 77046-0195
(713) 626-8060

September 27, 1985

Texas Supreme Court Building
Hon. Mary M. Wakefield, Clerk
200 W. 14th St., Room AG11
Austin, Texas 78701

Re: Case No. C-4184 (Direct Appeal from 334th District, Houston) Spring Branch I.S.D., et al. v. Chris Stamos, et al. Cause No. 85-25201.

Dear Clerk Wakefield:

Please file the enclosed original notice of appeal to the United States Supreme Court in your usual efficient and courteous manner. Please note that the *District Judge in this case is Hon. Marsha Anthony, and not Hon. Ken Harrison.*

Thank you.

Sincerely,

/s/ ANTHONY
Anthony D. Sheppard

ADS:rs

Enclosures

cc. To all Attorneys of record.

IN THE SUPREME COURT OF TEXAS

NO. C-4184

DIRECT APPEAL
FROM HARRIS COUNTY

SPRING BRANCH I.S.D., ET AL,
Appellants,

v.

CHRIS STAMOS, INDIVIDUALLY
AND A/N/F OF NICKY STAMOS, ET AL.,
Appellees

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

NOTICE is hereby given that CHRIS STAMOS, individually, and as next friend of NICKY STAMOS, a minor; BARRY BRUCE, individually, and as next friend of GREGG BRUCE, a minor; JAMES ROBERTS, individually, and as next friend of RICHARD ROBERTS, a minor; LORENE MEYER, individually, and as next friend of TROY J. MEYER, a minor; HARRY BRUDER, individually, and as next friend of CHRIS H. BRUDER, a minor; JOHN AUTENREITH, individually, and as next friend of JOHN AUTENREITH, JR.; JOHN OWENS, individually and as next friend of PETER OWENS, a minor; ROBERT DORRIS, individually, and as next friend of ERIC DORRIS, a minor; CHARLES BAGETT, individually, and as next friend of DEE BAGETT, a minor; JAMES HAYES, individually, and as next friend of TIM HAYES, a minor; and BRUCE

HOWARD, individually and as next friend of RON HOWARD, a minor, Plaintiffs, on their own behalf and on behalf of all students of Spring Branch Independent School District and Alief Independent School District similarly situated, and all other named Plaintiffs in this cause as consolidated HEREBY APPEAL TO THE UNITED STATES SUPREME COURT from the judgment and mandate of the Texas Supreme Court issued and entered in this action on the 26th day of September, 1985, which mandate and judgment is final in all ways for the purposes of this appeal. The opinion of the Texas Supreme Court in this cause was rendered on July 10, 1985. The United States Supreme Court has jurisdiction of this appeal as provided in 28 U.S.C.A., Section 1257(2), as interpreted in several relevant holdings, including *Cox Broadcasting Corporation, et al. v. Cohn*, 95 S.Ct. 1029 (1975); *National Socialist Party of America, et al. v. Village of Skokie*, 97 S.Ct. 2205 (1977). The United States Supreme Court shall review by appeal the judgment of the Texas Supreme Court herein as the Texas Supreme Court has held a statute of the State of Texas valid against the Plaintiffs' assertions and the Honorable District Court's ruling that the subject statute is wholly repugnant to the Constitution and laws of the United States of America.

Respectfully submitted,

Harpold, McDonald & Fitzgerald
Lew W. Harpold

/s/ ANTHONY D. SHEPPARD
Anthony D. Sheppard
Texas Bar Association No.
18226000
One Greenway Plaza East
Suite 820
Houston, Texas 77046
(713) 626-8060

Certificate of Service

A true copy of the above instrument has been mailed to all attorneys of record this 28th day of September, 1985.

/s/ ANTHONY D. SHEPPARD
Anthony D. Sheppard

APPENDIX D

TEXAS EDUCATION CODE, Section 21.920

PART F. EXTRACURRICULAR ACTIVITIES*

SECTION 1. Subchapter Z, Chapter 21, Education Code, is amended by adding Section 21.920 to read as follows:

Sec. 21.920. EXTRACURRICULAR ACTIVITIES. (a) The State Board of Education by rule shall limit participation in and practice for extracurricular activities during the school day and the school week. The rules shall, to the extent possible, preserve the school day for academic activities without interruption for extracurricular activities. In scheduling those activities and practices, a district must comply with the rules of the board.

(b) A student, other than a mentally retarded student, enrolled in a school district in this state shall be suspended from participation in any extracurricular activity sponsored or sanctioned by the school district during the grade reporting period after a grade reporting period in which the student received a grade lower than the equivalent of 70 on a scale of 100 in any academic class. The campus principal may remove this suspension if the class is an identified honors or advanced class. A student may not be suspended under this subsection during the period in which school is recessed for the summer or during the initial grade reporting period of a regular school term on the basis of grades received in the final grade reporting period of the preceding regular school term.

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* V.T.C.A. Education Code § 21.920.

(c) In this section, "mentally retarded" has the meaning assigned by Section 21.503(b)(5) of this code.

(d) Subsection (b) of this section applies beginning with the spring semester, 1985.

APPENDIX E

TEXAS ADMINISTRATIVE CODE
Title 19, Chapter 97.113

TEXAS EDUCATION AGENCY
201 East Eleventh Street
Austin, Texas 78701

- State Board of Education
- State Commissioner of Education
- State Department of Education

March 15, 1985

TO THE ADMINISTRATOR ADDRESSED:

Subject: Rules Adopted by the State Board of Education, March 1985 — Extracurricular Activities

Attached is a copy of 19 TAC Section 97.113, *Student Absences for Extracurricular or Other Activities,* as adopted by the State Board of Education in March 1985. The effective date of this rule is April 5, 1985. Until that time, the rule adopted on January 12, 1985 on an emergency basis remains in effect.

Substantive changes between this revised rule and the emergency rule are:

- subsection (b) allows exceptions, not to exceed five days, to the 10 absence limitation for post-district competitions for the UIL and for organizations approved by the commissioner of education. My letter of February 13, 1985 listed those organizations currently approved;
- subsection (c) reflects that to be eligible to participate in extracurricular activities at the beginning of the

school year, students in grades seven-nine must have been promoted in accordance with board rules on promotion and alternatives to social promotion recently sent to administrators. For grades 10-12, the number of credits required at the beginning of the year is phased in over the next two years; and

- subsection (k) limits practice in extracurricular activities to eight hours per school week per activity; and beginning September 1, 1985, the rule limits the scheduling of extracurricular activities to not more than one contest or performance per activity per student per school week.

Questions about this rule should be addressed to Ernest Chambers at (512) 475-6400, James Clark at (512) 475-5838, or Bettye DeFoe at (512) 475-3975.

Sincerely,

/s/ W. N. KIRBY
W. N. Kirby
Interim Commissioner of Education

Attachment

Planning and Accreditation

Title 19, Part II
Texas Administrative
Code and Statutory
Citations

Chapter 97

§ 97.113 *Student Absences for Extracurricular or Other Activities.*

Statutory Citation

Texas Education Code, § 21.920:

"(a) The State Board of Education by rule shall limit participation in and practice for extracurricular activities during the school day and the school week. The rules shall, to the extent possible, preserve the school day for academic activities without interruption for extracurricular activities. In scheduling those activities and practices, a district must comply with the rules of the board.

"(b) A student, other than a mentally retarded student, enrolled in a school district in this state shall be suspended from participation in any extracurricular activity sponsored or sanctioned by the school district during the grade reporting period after a grade reporting period in which the student received a grade lower than the equivalent of 70 on a scale of 100 in any academic class. The campus principal may remove this suspension if the class is an identified honors or advanced class. A student may not be suspended under this subsection during the period in which school is recessed for the summer or during the initial grade reporting period of a regular school term on the basis of grades received in the

final grade reporting period of the preceding regular school term.

"(c) In this section, "mentally retarded" has the meaning assigned by § 21.503(b)(5) of this code.

"(d) Subsection (b) of this section applies beginning with the spring semester, 1985."

Rule

(a) School districts shall not schedule, nor permit students to participate in, any school related or sanctioned activities on or off campus that would require, permit, or allow a student to be absent from class in any course more than ten times during the 175-day school year (full-year course). Noninstructional school activities must be held outside of minimum 55-minute scheduled academic class periods in grades nine-12, 45-minute scheduled academic class periods in grades seven-eight, and six hours of academic class periods in grades four-six, or be included in one of the six allowable shortened schedules referred to in § 105.71 of this title (relating to Days of Operation Required).

(b) A school district shall inform the commissioner of education of specific exceptions to the 10 absences limitation stated in subsection (a) of this section on behalf of individual students who are competing in UIL-sponsored activities. This exception must be based on circumstances which are unforeseen and which result from the students' earning the right to compete at post-UIL-district levels. Exceptions shall not exceed a total of five additional absences per year. Participants in post-district competitions spon-

sored by other organizations approved by the commissioner of education shall also be eligible for exceptions in accordance with this subsection. Exceptions will not be granted just to allow students who have not earned the right to compete at the post-district level to participate in more district-level activities than permitted under the 10 absences limitation

(c) A student in grades seven-12 may participate in extracurricular activities on or off campus at the beginning of the school year only if the student has earned the cumulative number of credits in state-approved courses indicated in this subsection:

(1) beginning at the seventh grade year—have been promoted from the sixth grade to the seventh;

(2) beginning at the eighth grade year—have been promoted from the seventh grade to the eighth;

(3) beginning at the ninth grade year—have been promoted from the eighth grade to the ninth;

(4) beginning of the 10th grade year—at least five credits toward graduation;

(5) beginning of the 11th grade year—at least nine credits toward graduation for the 1985-1986 school year and 10 credits each year thereafter; and

(6) beginning of the 12th grade year—at least 13 credits toward graduation for the 1985-1986 school year, at least 14 credits for the 1986-1987 school year and 15 credits each year thereafter.

(d) In order to be eligible to participate in an extracurricular activity event for a six weeks period following the initial six weeks period of a school year, a student must not have a recorded grade average lower than 70 on a scale of 0 to 100 in any course for that preceding six weeks period.

(e) A student whose recorded six weeks grade average in any course is lower than 70 at the end of a six weeks period shall be suspended from participation in any extracurricular activity event during succeeding six weeks periods until the end of a six weeks period during which such student achieves a course grade average for that six weeks of at least 70 in each course, except the campus principal may remove this suspension if the class is identified as an honors class under the criteria stated in § 75.152(d) of this title (relating to Advanced High School Program), or advanced class as follows:

(1) English language arts: English IV Academic (comp.), English IV Academic (British Literature), World Literature, Creative/Imaginative Writing, Research/Technical Writing, Debate III, Public Speaking III;

(2) Other Languages: Other Languages III, Advanced Languages I-IV;

(3) Social Studies: Advanced Social Science Problems;

(4) Fine Arts: Art IV, Theatre Arts IV, Band IV, Orchestra IV, Choral Music IV, Stage Band IV, and Music Theory I-II;

(5) Mathematics: Trigonometry, Elementary Analysis; Analytic Geometry, Pre-Calculus, Linear Algebra, Calculus; and

(6) Science: Physics, Physics II, Chemistry II, Biology II.

(f) For the 1984-1985 school year, suspensions shall begin with the second six weeks period of the spring semester based on a student's earning a grade lower than 70 in any course taken during the first six weeks of the spring semester. Such suspension shall become effective seven days after the last day of the six weeks period during which the grade lower than 70 was earned.

(g) A student who has been suspended from extracurricular activity events pursuant to subsections (e) and (f) of this section shall also be suspended from out-of-school practice in such extracurricular activities until such suspension from participation has been lifted.

(h) At the end of any six weeks period in which a student has attained a course grade average for that six weeks of 70 or more in each course taken, any suspension from participating in extracurricular activities and/or suspension of out-of-school practice of extracurricular activities shall be removed.

(i) All UIL-sponsored activities are sanctioned as school-related activities and therefore come under the provisions of this section. The governing boards at the highest state level of any other organizations requiring student participation which cause a student to miss a class during the school day must request approval, in writing, from the commissioner of educa-

tion. If approval of the organization is granted and the local board of trustees concurs, student participation in the organization's activities will be subject to all provisions of this section. If approval is not granted, any absences incurred by the student will be considered unexcused.

(j) School districts shall develop a policy which implements this section, including a provision regulating the number of times a student may be absent pursuant to subsection (a) of this section during any one semester course.

(k) Limitations on practice and performance shall be as follows:

(1) School districts shall adopt policies limiting extracurricular activities from the beginning of the school week through the end of the school week (excluding holidays) by scheduling no more than one contest or performance per activity per student and by limiting practice outside the school day to a maximum of eight hours per school week per activity except as specified in paragraph (2) of this subsection. For schools with limited facilities, exceptions may be made to the one contest or performance per activity by the commissioner of education. The rule concerning scheduling one contest or performance per activity per student per school week shall be effective September 1, 1985.

(2) Tournaments and post-season competition, as well as contests postponed by weather or public disaster, may also be scheduled during the school week. This subsection shall apply only to the

University Interscholastic League and other organizations sanctioned by the Central Education Agency in accordance with subsection (i) of this section.

(l) At the end of the first three weeks of a grading period, the school district shall send notice of progress to the parent or guardian of a student whose grade average in any class is lower than 70 or whose grade average is deemed borderline by the district. The district shall make such information available to sponsors of extracurricular activities in which the student participates. The notice should stipulate that the student will have the remainder of the six weeks period to bring the grade up to 70 or above and that the student will be suspended from extracurricular activities if the grade is not brought up to 70 or above by the end of the six weeks period. The district may require any student who falls within this subsection to attend tutorial sessions.

(m) Definitions of "curricular", "cocurricular", and "extracurricular" activities shall be as follows:

(1) Curricular activities occur within the regular school day and constitute the delivery of instruction as specified in Chapter 75 of this title (relating to Curriculum).

(2) Cocurricular activities are an extension of classroom instruction in which participation is by the entire class or a significant portion thereof. They relate directly to and enhance student learning of essential elements through participation, demonstration, illustration, and observation. Cocurricular activities are included in the

teacher's instructional plan and are conducted by or supervised by a classroom teacher or other educational professional such as a librarian, school nurse, counselor, or administrator. Subsection (e) of this section shall not prevent students from participating in after-school cocurricular activities. Absences for participation in cocurricular activities that require a student to miss a class other than the sponsoring class or course shall be counted under the 10-day rule.

(3) Extracurricular activities are school-sponsored activities which are not directly related to instruction of the essential elements, but they may have an indirect relation to some areas of the curriculum. They offer worthwhile and significant contributions to a student's personal, physical, and social development. Participation in extracurricular activities is a privilege and not a right, and students must meet specific requirements in order to participate. Activities may include, but are not limited to, performances, contests, demonstrations, displays, and club activities.

(n) For the fourth six-week period in the 1984-1985 school year only, a student may participate in extracurricular or other activities on or off campus that require absences from one or more classes only if:

(1) the student has and maintains a 70 average or better in at least four of the courses in which that student is enrolled for the prior and current semester;

(2) that student does not miss any class in which the student does not have and maintain at least a 70 average; and

(3) only courses approved for state graduation credit by the State Board of Education may be counted toward the number in which the student must have and maintain a 70 average or better. Courses in physical education or competitive athletics may not be counted.

(o) For the fourth six-week period in the 1984-1985 school year only, students shall be eligible to participate in University Interscholastic League activities in accordance with current University Interscholastic League rules and this subsection.

(1) The student is eligible to participate in a league varsity contest as a representative of a participant school if he or she meets current University Interscholastic League requirements and the following:

(A) The student has attended more than one-half of the preceding semester and passed at least four one-half credit courses, including at least three separate courses, as required by the University Interscholastic League constitution and contest rules, § 411, as it was in effect for the fall semester of the 1984-1985 school year.

(B) The student is passing at least four one-half credit courses or the equivalent, including at least three separate courses, as required by the University Interscholastic League constitution and contest rules,

§ 412, as it was in effect for the fall semester of the 1984-1985 school year.

(2) To determine if a student is passing at least four one-half credit courses, the student's work from the beginning of the semester to seven days before the contest (or 30 days before a music contest) in which the student intends to participate must be considered.

Adopted by the State Board of Education, March, 1985.

APPENDIX F

TEXT OF 42 U.S.C.A. § 1983

42 U.S.C.A. § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

APPENDIX G

TEXT OF 29 U.S.C.A. § 794

29 U.S.C.A. § 794. Nondiscrimination under federal grants and programs: promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulations may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(As amended Pub.L. 95-602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.)

APPENDIX H

TEXT OF 20 U.S.C.A. 1400, 1401

SUBCHAPTER I—GENERAL PROVISIONS

20 U.S.C.A. § 1400. Congressional statements and declarations.

(a) *Short title*

This capter may be cited as the "*Education of the Handicapped Act*".

(b) *Findings*

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) *Purpose*

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education

of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children. Pub.L. 91-230, Title VI, § 601, Apr. 13, 1970, 84 Stat. 175, amended Pub.L. 94-142, § 3(a), Nov. 29, 1975, 89 Stat. 774.)

20 U.S.C.A. § 1401. Definitions

(a) As used in this chapter—

(1) The term "*handicapped children*" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific *learning disabilities,* who by reason thereof require special education and related services.

(2) Repealed. Pub.L. 98-199, § 2(2), Dec. 2, 1983, 97 Stat. 1357.

(3) The term "Advisory Committee" means the National Advisory Committee on the Education of Handicapped Children.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(11) The term "institution of higher education" means an educational institution in any State which—

APPENDIX I

CODE OF FEDERAL REGULATION RULE 300.306 AND 300.553

Rule 300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and *extracurricular services* and activities in such manner as is necessary to afford handicapped children an *equal opportunity for participation in those services and activities.*

(b) Nonacademic and extracurricular services and activities may include counseling services, *athletics,* transportation, health services, recreational activities, *special interest groups* or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A), 1414(a)(1)(C))

Rule 300.553. Nonacademic settings.

In providing or arranging for the provision of nonacademic and *extracurricular services and activities,* including meals, recess periods, and the services and activities set forth in § 300.306 of Subpart C, each public agency shall insure that *each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.*

(20 U.S.C. § 1412(5)(B))

Comment. Section 300.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (34 CFR Part 104—Appendix Paragraph 24.

APPENDIX J

NO. 85-25201

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
334th JUDICIAL DISTRICT

CHRIS STAMOS, INDIVIDUALLY, AND AS NEXT FRIEND OF NICKY STAMOS, A MINOR, ET AL.,
Plaintiffs

v.

SPRING BRANCH I.S.D. AND ALIEF I.S.D., ET AL.,
Defendants

ORDER AUTHORIZING PLAINTIFFS' CLASS ACTION IN THE STATE OF TEXAS

BE IT KNOWN that on the undersigned date came on to be heard Plaintiffs' Motion for Class Certification under the relevant law, and all parties defendant having been notified hereof, and having appeared herein or having an opportunity to so appear, and the Plaintiffs having duly appeared, and the Court having considered all relevant law and evidence and the arguments and stipulations of counsel, decided that the Plaintiffs' motion should be granted in all ways, now, therefore;

IT IS ORDERED and ADJUDGED that the Plaintiffs' Motion for Class Certification as to the Plaintiffs and Defendants is GRANTED, and the Plaintiffs in this cause are hereby deemed representatives for a class consisting of all public school children in the State of Texas, and the Texas Education Agency, the Spring Branch In-

dependent School District, the Alief Independent School District, the Houston Independent School District and the Klein Independent School District are hereby deemed class representatives for all public school districts in the State of Texas, as indexed and catalogued by the Texas Education Agency.

IT IS FURTHER ORDERED that the attorneys for Plaintiffs, Anthony D. Sheppard and Lew W. Harpold, shall send or have sent the notices attached hereto and made a part hereof, by U. S. Mail, to every public school district in the State of Texas as those local units of government are named and indexed by the Texas Education Agency, with instructions from the Texas Education Agency under that Defendant's letterhead that such notices directed to students, parents and guardians are to be properly and clearly reproduced and posted by each such district in conspicuous places in each public school facility in each such district of the State of Texas, and that the shool officials in each such school in each such district shall provide a copy of such notices to any public school student or the parent or guardian of any such student requesting a copy of same. Additionally, each such public school district may use its own discretion in connection with disseminating notice of this class action suit to all parents, guardians, and students in each such district in the State.

IT IS FURTHER ORDERED that the Defendant, Texas Education Agency, shall furnish to Anthony D. Sheppard and Lew W. Harpold a true and legible list of each public school district in the State of Texas, together with the official mailing address of each such district, along with the other data normally utilized by the Texas

Education Agency when mailing its official communications to each such district in the State of Texas under its jurisdiction.

SIGNED this 23rd day of October, 1985.

/s/ MARSHA ANTHONY
Marsha Anthony, Presiding Judge

LET NOTICE ISSUE

APPROVED:

Anthony D. Sheppard
Attorney-at-Law
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/s/ ANTHONY D. SHEPPARD
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Attorneys for Plaintiffs
and The Class of Plaintiffs

STATE OF TEXAS
COUNTY OF HARRIS

I, Ray Hardy, District Clerk of Harris County, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, as appears of record in Vol. 3138, Page 338. Minutes of said court on file in my office.

Witness my official hand and seal of office, this October 25, 1985.

Ray Hardy, District Clerk
Harris County, Texas

By /s/ L. HOLMES, Deputy
L. Holmes

NO. 85-25201

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

CHRIS STAMOS
INDIVIDUALLY, AND AS NEXT FRIEND
OF NICKY STAMOS, A MINOR, ET AL.,
PLAINTIFFS

v.

SPRING BRANCH I.S.D.
AND ALIEF I.S.D., ET AL.,
DEFENDANTS

NOTICE OF PENDENCY OF CLASS ACTION
IN THE STATE OF TEXAS

TO: ALL PUBLIC SCHOOL *STUDENTS* AND
THEIR PARENTS OR LEGAL GUARDIANS
THE STATE OF TEXAS

NOTICE IS HEREBY GIVEN that a suit has been filed in this Court that may affect your legal interests. This case has been certified by this District Court as a Class Action by the Plaintiffs against the Defendants. A class action is a lawsuit in which one or more persons can sue on behalf of other persons in the same or similar general situation with the same or similar claims for ultimate relief. The records in this case indicate that you are in the same or similar general situation as CHRIS STAMOS, individually, and as next friend of NICKY STAMOS, a minor; BARRY BRUCE, individu-

ally, and as next friend of GREGG BRUCE, a minor; JAMES ROBERTS, individually, and as next friend of RICHARD ROBERTS, a minor; LORENE MEYER, individually, and as next friend of TROY J. MEYER, a minor; HARRY BRUDER, individually, and as next friend of CHRIS H. BRUDER, a minor; JOHN AUTENREITH, individually, and as next friend of JOHN AUTENREITH, JR.; JOHN OWENS, individually, and as next friend of PETER OWENS, a minor; ROBERT DORRIS, individually, and as next friend of ERIC DORRIS, a minor; CHARLES BAGETT, individually, and as next friend of DEE BAGETT, a minor; JAMES HAYES, individually, and as next friend of TIM HAYES, a minor; and BRUCE HOWARD, individually and as next friend of RON HOWARD, a minor; LELA ARNES, individually and as next friend of NOLAN ARNES, a minor; and KENNETH PATTERSON, individually and as next friend of LORI PATTERSON, a minor; and DONALD R. TIDWELL, individually and as next friend of MONTY TIDWELL, a minor; and that you are a member of the class the Plaintiffs represent. This Court has ruled that the above-named Plaintiffs may bring this suit on behalf of all persons who are students currently enrolled in the public schools of Texas.

AS A MEMBER OF THIS CLASS, YOU ARE FURTHER NOTIFIED IN THE FOLLOWING MATTER:

1. The individual Plaintiffs listed above, instituted this action on or about the 25th day of April, 1985, and in part thereafter in the District Court against the Spring Branch and Alief Independent School Districts of Harris County, Texas.

2. The Texas Attorney General and the Texas Education Agency intervened in this case. The University Interscholastic League was made a party defendant by the Alief Independent School District, and answered the suit.

3. The named Plaintiffs allege that this action is brought not only on behalf of themselves but on behalf of all public school students in the State of Texas.

4. The named Plaintiffs allege that the following allegations and contentions are common questions of law or fact common to all members of the said school districts:

a. The constitutionality of 19 TAC, § 97.113, Texas Education Code, § 21.920, and other related policies of the Districts, Texas Education Agency and the U.I.L. under the Constitutions of the United States and State of Texas.

b. The constitutionality of ex post facto enforcement of said laws and policies.

c. Whether the penalties imposed by such laws and policies are so arbitrary and capricious and so harsh and unreasonable and so totally unrelated to any legitimate state interest as to be void.

d. The validity of 19 TAC § 97.113 and Texas Education Code, Sec. 21.920 under the laws of the United States of America.

The Plaintiffs seek solely injunctive and equitable relief against the enforcement of the above-listed laws and policies. *Damages, per se are not sought,* but mandatory and prohibitory injunctive relief is sought.

YOU ARE NOT BEING SUED. THERE IS NO REQUIREMENT THAT YOU ATTEND COURT, HIRE A LAWYER, OR PAY ANY COSTS OF THIS LITIGATION. IF YOU CHOOSE, YOU MAY HIRE YOUR OWN LAWYER AND YOU WILL BE RESPONSIBLE FOR PAYING YOUR OWN LAWYER'S FEES AND COSTS INCURRED.

You are advised that you are a member of the class and that if you do not wish to be considered a member of this class and represented by the above-named Plaintiffs, you may be excluded from this lawsuit by completing and mailing a letter containing the information found in the REQUEST TO BE EXCLUDED FROM CLASS, as below listed, to the person named therein at such address and containing the information therein, on or before NOVEMBER 15, 1985, requesting exclusion from the class and this action. All information for such a request is found in the REQUEST TO BE EXCLUDED FROM CLASS.

If you are excluded from the class, you will not be bound by the terms of any settlement or judgment herein, and you will be free to pursue any legal rights you may have on your own behalf. No monetary damages are sought in this cause of action (THEREFORE, NO MEMBER OF THE CLASS WILL RECEIVE ANY MONETARY COMPENSATION AS A RESULT OF THIS CAUSE OF ACTION).

YOU ARE FURTHER ADVISED THAT AS A MEMBER OF THE CLASS, UNDER TEXAS LAW:

1. You will be bound by the terms of any judgment rendered herein.

2. The attorneys representing the class are Anthony D. Sheppard, State Bar No. 18226000 and Lew W. Harpold, State Bar No. 09035000, One Greenway Plaza, Suite 820, Houston, Texas 77046-0195. If you desire to remain in the class, no action on your part is necessary. However, you may, if you wish, enter an appearance through your own attorney, if you do so before NOVEMBER 15, 1985. If you do not hire your own lawyer and you do not fill out and mail a letter of REQUEST TO BE EXCLUDED FROM CLASS you will be represented by the lawyers for the class.
3. You may be subjected to a cross-complaint or some other affirmative action by the Defendant, but discovery cannot be had against you.
4. Although this action is pending the Defendants are not prevented in any way from exercising all remedies available by contract or law.
5. You may contact the attorneys for the Plaintiffs listed above for further information concerning this action.

FURTHER, the Court, by initially certifying the above-constituted class in this action, does not necessarily express any final opinions as to the full merits of this pending action.

SIGNED, this 23rd day of October, 1985.

/s/ MARSHA ANTHONY
Marsha Anthony
Presiding Judge

REQUEST TO BE EXCLUDED FROM CLASS OF PLAINTIFFS

TO: HON. RAY HARDY, District Clerk, Harris County, Texas
P. O. Box 4651, Houston, Texas 77210.

RE: Cause No. 85-25201; CHRIS STAMOS, Individually and as Next Friend of Nicky Stamos, et al. vs. SPRING BRANCH INDEPENDENT SCHOOL DISTRICT AND ALIEF INDEPENDENT SCHOOL DISTRICT; 334 Judicial District Court of Harris County, Texas

NAME: _____
(Please Print)

ADDRESS: _____
(Please Print)

STUDENT'S NAME: _____
(Please Print)

Please exclude me from the Plaintiffs' class as now certified in this case by the District Judge.

_____
(Signature of Parent of Legal Guardian or Class Member at Least 18 Years of Age)

USE THIS FORM ONLY IF YOU *DO NOT* WISH TO STAY IN THE CLASS.

NO. 85-25201

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

CHRIS STAMOS
INDIVIDUALLY, AND AS NEXT FRIEND
OF NICKY STAMOS, A MINOR, ET AL.,
PLAINTIFFS

v.

SPRING BRANCH I.S.D.
AND ALIEF I.S.D., ET AL.,
DEFENDANTS

NOTICE OF PENDENCY OF CLASS ACTION
IN THE STATE OF TEXAS

TO: ALL PUBLIC SCHOOL *DISTRICTS*
IN THE STATE OF TEXAS

NOTICE IS HEREBY GIVEN that a suit has been filed in this Court that may affect your legal interests. This case has been certified by this District Court as a Class Action by the Plaintiffs against the named Defendants and a *class of defendants* consisting of all public school districts in the State of Texas. A class action is a lawsuit in which one or more persons can sue on behalf of other persons in the same or similar situation with the same or similar claims for relief. In many ways, your interests as class defendants are virtually represented by the Texas Education Agency, who is a defendant in this case. This Court has ruled that the Plaintiffs and the Plaintiffs' class may bring this suit on behalf of all persons

who are students currently enrolled in public schools in the State of Texas against the defendants and all public school districts in the State. Your district is a member of the class of defendants consisting of all public school districts in the State of Texas.

AS A MEMBER OF THIS CLASS OF DEFENDANTS, YOU ARE FURTHER NOTIFIED IN THE FOLLOWING MATTER:

1. The individual Plaintiffs in this action instituted this action on the 25th day of April, 1985, and in part thereafter in the District Court against the Spring Branch and Alief Independent School Districts of Harris County, Texas.

2. The Texas Attorney General and the Texas Education Agency intervened in this case. The University Interscholastic League was made a party defendent by the Alief Independent School District and has appeared in the case.

3. The named Plaintiffs allege that this action is brought not only on behalf of themselves but on behalf of all students in the State against all named Defendants and all public school districts in the State.

4. The named Plaintiffs allege that the following allegations and contentions are common questions of law or fact common to all parties in the case, plaintiffs and defendants:

a. The constitutionality of 19 TAC, § 97.113, Texas Education Code, § 21.920, and other related policies of the Districts, Texas Education Agency and the U.I.L. under the United States and Texas Constitutions.

b. The constitutionality of ex post facto enforcement of said laws and policies.

c. Whether the penalties imposed by such laws and policies are so arbitrary and capricious and so harsh and unreasonable and so totally unrelated to any legitimate state interest as to be void.

d. The validity of 19 TAC, Sec. 97.113 and Texas Education Code, Sec. 21.920 under the laws of the United States of America.

The Plaintiffs seek solely injunctive and equitable relief against the enforcement of the above-listed laws and policies.

Damages, per se are not sought.

THERE IS NO REQUIREMENT THAT YOU ATTEND COURT, HIRE A LAWYER, OR PAY ANY COSTS OF THIS LITIGATION. IF YOU CHOOSE, YOU MAY HIRE YOUR OWN LAWYER IN THE CASE AND YOU WILL BE RESPONSIBLE FOR PAYING YOUR OWN LAWYER'S FEES AND COSTS INCURRED.

YOU ARE FURTHER ADVISED THAT AS A MEMBER OF THE CLASS OF DEFENDANTS UNDER TEXAS LAW:

1. You will be bound by the terms of any judgment rendered herein.

2. You may be subjected to further complaint or some other affirmative action by the Plaintiffs.

3. Although this action is pending, the Plaintiffs are not prevented in any way from exercising all remedies available by contract or law.

4. This matter is set for trial on November 18, 1985 and the Texas Education Agency has agreed to this setting.

FURTHER, the Court, by initially certifying the above-constituted classes in this action, does not necessarily express any final opinions as to the full merits of this pending action.

SIGNED this 23rd day of October, 1985.

By: /s/ MARSHA ANTHONY
Marsha Anthony, Presiding Judge

APPENDIX K

NO. 35-25201

CHRIS STAMOS INDIVIDUALLY, AND AS NEXT FRIEND OF NICKY STAMOS, A MINOR, ET AL.,
Plaintiffs

v.

SPRING BRANCH I.S.D. AND ALIEF I.S.D.
Defendants

In this District Court of Harris County, Texas
334th Judicial District

EMERGENCY DISCOVERY ORDER

BE IT KNOWN that on the undersigned date came on Plaintiffs' and the Class' Motion for Emergency Bill of Discovery, and the Court having considered the facts, law and affidavit of Counsel, and having considered the welfare of the minor Plaintiffs and accelerated trial setting of November 18, 1985, and the immediate, crucial need of this Court for the data sought in the attached exhibit, IT IS ORDERED that:

1. Each public school district in the State of Texas receiving this Order shall forthwith furnish all of the information and data sought on the attached Exhibit to the *Texas Education Agency*, 1701 North Congress Ave., Austin, Texas 78701, (512) 463-9734 by, on or before *November 12, 1985*. Said information shall be so furnished by timely completing the forms as provided. Each such district shall verify by all reasonable means that the

Texas Education Agency receives such data on or before said date.

2. The Texas Education Agency shall receive the described data from each such public school district in the State of Texas, and shall be prepared upon the trial of this cause to report to this Court as to the data from each such district and the totals for each category of information sought for all districts together so that the Court may examine the impact of the law insofar as the issues of this case are concerned. The trial is set for November 18, 1985. Hon. W. N. Kirby, Commissioner of Education, shall duly carry out this order under his direction, and shall testify beginning November 18, 1985 in this regard.

3. The attorneys for Plaintiffs and the Class of Plaintiffs shall distribute a copy of this Order and the attached Exhibits to each public school district in Texas along with the Class Action instruments as heretofore duly ordered.

SIGNED this 31st day of October, 1985.

By: /s/ MARSHA ANTHONY
District Judge Presiding
Marsha Anthony

LET NOTICE ISSUE

STATE OF TEXAS
PARTICIPATION AND EXCLUSION REPORT
EXTRACURRICULAR ACTIVITIES

Name of Public School District: _____

Mailing Address of District: _____

Telephone No. of District: ( )_____

School Year: _____ _____ Six Weeks

Total Student Population (District): _____

District Data:

Percentage of Black Students: _____

Percentage of Mexican-American Sudents: _____

Percentage of Anglo (White) Students: _____

Percentage of Learning-Disabled* Students: _____

**Failure Rate for Black Students: _____

Failure Rate for Mexican-American Students: _____

Failure Rate for Anglo (White) Students: _____

Failure Rate for Learning-Disabled Students: _____

Failure Rate for All Students in Extracurricular Activities: _____

***Exclusion Rate for Black Students: _____

Exclusion Rate for Mexican-American Students: _____

Exclusion Rate for Anglo (White) Students: _____

Exclusion Rate for Learning-Disabled Students: _____

*AS DEFINED, TEXAS EDUCATION CODE

**FAILURE RATE: The percentage of students earning less than 70 in one or more courses regardless of participation in extracurricular activities.

***EXCLUSION RATE: The percentage of students excluded from a particular extracurricular activity or extracurricular activities (generally) by reason of their earning less than a 70 average in one or more courses in the previous six-week grading period.

CERTIFICATE

STATE OF TEXAS)
)
COUNTY OF _____)

The information contained in this report was accumulated in the normal course of school business by public employees with personal knowledge of the data presented and the activities, events and conditions reflected herein, and the information is true and correct to the best of my knowledge and belief.

_____
SCHOOL DISTRICT

By: _____
Superintendent or Deputy Superintendent

Printed Name: _____

SWORN TO BEFORE ME, the undersigned authority on this the ____ day of _____, 1985.

_____
NOTARY PUBLIC
IN AND FOR THE
STATE OF TEXAS

Printed Name: _____

My Commission Expires: _____

EXTRA-CURRICULAR ACTIVITY	PARTICIPANTS					BELOW 70 AND EXCLUSION RATE									
	WHITES	BLACKS	MEX. AMERS.	LEARNING-DISABLED	TOTAL	WHITES		BLACKS		MEX.AMERS.		Learning Dis.		TOTAL	
						No.	Rate(%)	No.	Rate(%)	No.	Rate(%)	No.	Rate(%)	No.	Rate(%)
1. ATHLETICS															
Football															
Baseball															
Basketball															
Track															
Others															
TOTAL ATHLETICS															
2. FINE ARTS															
Bands															
Choir															
Drama															
Orchestra															
Others															
TOTAL ARTS															
3. CLUBS-TEAMS															
Debate-Speech															
Journalism															
Computer															
Spanish															
German															
Others															
TOTAL CLUBS															

EXTRA-CURRICULAR ACTIVITY	PARTICIPANTS					BELOW 70 AND EXCLUSION RATE										
	WHITES	BLACKS	MEX. AMERS.	LEARNING-DISABLED	TOTAL	WHITES		BLACKS		MEX.AMERS.		Learning Dis.		TOTAL	
						No.	Rate(%)	No.	Rate(%)	No.	Rate(%)	No.	Rate(%)	No.	Rate(%)
4. STUDENT GOVERNMENT															
5. VOCATIONAL															
FFA															
4-H															
Drafting															
Future Nurses Assoc.															
Future Teachers Assoc															
C.V.A.E															
H.O.S.A															
O.E.A															
I.C.T															
Others															
TOTAL VOCATIONAL															
6. CHEER-LEADERS															
7. BRIGADE															
8. OTHER EXC. ACTIVITIES															
TOTAL - ALL EXTRA-CURRICULAR ACTIVITIES															

C.V.A.E. - Cooperative Vocational Adjustments Education

H.O.S.A. - Health Occupations Students of America (in association with H.O.C.E. - Health Occupations Cooperative Education)

O.E.A. - Office Education Association

I.C.T. - Industrial Cooperative Training

85-1232

Supreme Court, U.S.
FILED
JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1985

* * * * * * * * * * *

NO. _____

* * * * * * * * * * *

CHRIS STAMOS, Individually and as Next Friend of Nicky Stamos, a Minor, et al.,

Appellants,

V.

SPRING BRANCH INDEP. SCHOOL DIST., et al.,

Appellees.

* * * * * * * * * * *

ON APPEAL FROM THE SUPREME COURT OF TEXAS

* * * * * * * * * * *

MOTION OF APPELLEE UNIVERSITY INTERSCHOLASTIC LEAGUE TO DISMISS OR AFFIRM

* * * * * * * * * * *

BUNTON, NOLAN, ODÉ & COOPER
511 West Seventh Street
Austin, Texas 78701
(512)480-8227

By: Connie Odé
Lucius Desha Bunton, Jr.

THE UNIVERSITY OF TEXAS SYSTEM
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701
(512)499-4462

By: J. Robert Giddings

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1985

* * * * * * * * * * *

NO. _____

* * * * * * * * * * *

CHRIS STAMOS, Individually and as Next Friend of Nicky Stamos, a Minor, et al.,

Appellants,

V.

SPRING BRANCH INDEP. SCHOOL DIST., et al.,

Appellees.

* * * * * * * * * * *

ON APPEAL FROM THE SUPREME COURT OF TEXAS

* * * * * * * * * * *

MOTION OF APPELLEE UNIVERSITY INTERSCHOLASTIC LEAGUE TO DISMISS OR AFFIRM

* * * * * * * * * * *

Appellee the University Interscholastic League moves the Court

to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Texas on the grounds that the appeal is not within the Court's jurisdiction, and it is manifest that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

I.

STATE STATUTE INVOLVED AND NATURE OF THE CASE

A. Statute

This appeal questions the validity of Section 21.920 of the Texas Education Code, more commonly known as the "no-pass, no-play" rule. That rule provides that no student within the Texas public school system who receives a grade lower than 70 on a scale of 100

in any academic class for a given grade reporting period is eligible to participate in extracurricular activities during the following grade reporting period. TEX. EDUC. CODE ANN. §21.920(b) (Vernon Supp. 1985). Consistent with this statute, the University Interscholastic League, a voluntary non-profit association of Texas public schools that establishes rules and procedures for conducting the majority of interscholastic competitions among Texas junior and senior high schools, amended Section 400 of its Constitution and Contest Rules to provide as follows:

> [A]n individual is eligible to participate in a League varsity contest as a representative of a participant school if he:

* * *

> (g) has been in attendance and has passed the number of courses required by state law and by rules of the State Board of Education,
>
> (h) is passing the number of courses required by state law and by rules of the State Board of Education . . . .

B. Proceedings Below

On the basis of the statute and Section 400 of Appellee's Constitution and Contest Rules, Appellants were deemed ineligible for extracurricular activities in the spring of 1985, during the six-week grading period following the six-week grading period in which each received a grade lower than 70 in an academic class. For the most part, Appellants were disqualified from participating in extracurricular athletic activities, such as track and

spring football and basketball. One Appellant was disqualified from participation is his school's symphonic band, and one Appellant was disqualified from participation in his school's orchestral band. See Appendix, Temporary Injunction of the 334th District Court of Houston, Harris County, Texas, pp. 2-3.

Contending that such disqualification deprived them of freedom of association with their peers, personal and family privacy, and the right of private family discipline, and impinged upon their "protected rights," Appellants sought and obtained a temporary restraining order and a temporary injunction. The trial court concluded that the statute was

unconstitutional because it deprived Appellants of fundamental rights in accordance with their allegations and because it was "not rationally related to the State's professed purpose in promulgating [the statute], to provide a negative or positive incentive to improve the students' education." On direct appeal, the Texas Supreme Court reversed the trial court, ruling that the statute violated neither the equal protection nor due process guarantees of the state or federal constitution.

II.

ARGUMENT

A. The Appeal Is Not Within the Court's Jurisdiction

This appeal is brought pursuant to 28 U.S.C. §1257(2)(1966), which provides for direct appeals to this

Court of "[f]inal judgments or decrees" rendered by the highest state court in which a decision can be had. While this appeal calls into question the constitutional validity of Texas' so-called "no-pass, no-play" rule under the United States Constitution as required by §1257(2), the judgment is not final as required by that provision. The judgment sought to be appealed was rendered by the Texas Supreme Court in ruling upon the propriety of the trial court's grant of a temporary injunction; Appellants' request for a permanent injunction, as well as numerous issues not disposed of by the Supreme Court's ruling, remain for disposition in the trial court. A state court's ruling on an order

granting or denying a temporary injunction is not final when the entire case is not thereby concluded. Musser v. Sheppard, 299 U.S. 512 (1936). In Collins v. Miller, 252 U.S. 364 (1920), the Court wrote:

> A case may not be brought here by appeal . . . in fragments. To be appealable the judgment must be not only final, but complete . . . And the rule requires that the judgment to be appealed should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved.

Id. at 370 (citations omitted).

This appeal is not within the Court's jurisdiction for the further reason that Appellants lack standing to raise the majority of the issues presented. While Appellants contend that this is a class action suit, such

was not the case at the time of the trial's court temporary injunction order nor at the time of the Supreme Court's decision on that order. The Texas Supreme Court noted specifically that there were no parties before it either with learning disabilities or who had failed an honors or advanced course. Spring Branch Indep. School Dist. v. Stamos, 695 S.W. 2d 556, 559, 560 (1985). Nor were there any parties before it who were barred from those extracurricular activities that Appellants contend "entail the exercise of First Amendment Rights, i.e. student government, the school newspaper, the debate squad, etc." Enforcement of the challenged judgment must deprive a party, not another, of a constitutional

right properly asserted below. Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Marketing Assoc., 276 U.S. 71, 88 (1928). Such party must have a personal stake in the outcome of the litigation "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). Appellants' lack of standing is further evidence that the challenged judgment is not ripe for review by this Court.

B. The Case Presents No Substantial Question Needing Further Argument

The substance of Appellants' appeal challenges the "no-pass, no-play" rule

on the basis that it denies Appellants both equal protection and due process of law. These challenges have long been settled, however, in Appellee's favor, so much so that the Fifth Circuit Court of Appeals wrote recently:

> We repeat: we are not super referees over high school athletic programs. Questions about eligibility for competition may loom large in the eyes of youths, and even their parents. We do not disparage their interest in concluding, as here, that these issues are not of constitutional magnitude. Behind this observation rest important values of federalism and the reality that the mighty force of the constitutional commands ought not to be so trivialized. We pause to say this, not to succumb to rhetorical flourish but to remind.

Hardy v. Univ. Interscholastic League, 759 F.2d 1233, 1235 (5th Cir. 1985).

The privilege of participation in extracurricular activities generally is no different than the privilege of participation in extracurricular athletics specifically, and the courts have held again and again that such participation does not amount to a constitutionally protected claim of entitlement. See, e.g., Niles v. Univ. Interscholastic League, 715 F. 2d 1027, 1031 (5th Cir. 1983), and Walsh v. Louisiana High School Athletic Assoc., 616 F. 2d 152, 159 (5th Cir. 1980), cert. denied, 449 U.S. 1124 (1981).

Nor does ineligibility for participation in extracurricular activities on the basis of the Texas statute violate traditional notions of equal protection. Because the statute

neither infringes upon a fundamental right nor creates an inherently suspect classification, equal protection analysis requires only that the classification in question be rationally related to a legitimate state interest. See Harris v. McRae, 448 U.S. 297, 324, reh. denied, 448 U.S. 917 (1980), and Denis J. O'Connell High School v. Virginia High School League, 581 F. 2d 81, 84 (4th Cir. 1978), cert. denied, 440 U.S. 936 (1979). The task of the court is not to determine if the rule is the best way, or even a good way, of accomplishing a legitimate state objective. It is only to determine whether "any state of facts reasonably may be conceived to justify it"; beyond

that, the wisdom of the state must be allowed to prevail. McGowan v. Maryland, 366 U.S. 420, 426 (1961). In this regard, the Texas Supreme Court's analysis is beyond attack:

> The no-pass, no-play rule distinguishes students based upon whether they maintain a satisfactory minimum level of performance in each of their classes. Students who fail to maintain a minimum proficiency in all of their classes are ineligible for participation in school-sponsored extracurricular activities for the following six-week period, with no carry over from one school year to the next. The rule provides a strong incentive for students wishing to participate in extracurricular activities to maintain minimum levels of performance in all of their classes. In view of the rule's objective to promote improved classroom performance by students, we find the rule rationally related to the legitimate state interests in providing a quality education to Texas' public school students.

Spring Branch Indep. School Dist. v. Stamos, supra at 560.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the appeal is not within the Court's jurisdiction and that the questions on which decision of this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered herein by the Supreme Court of Texas.

Respectfully submitted,

BUNTON, NOLAN, ODÉ & COOPER
511 West Seventh Street
Austin, Texas 78701
(512)480-8227

By: Connie Odé

Lucius Desha Bunton, Jr.

THE UNIVERSITY OF TEXAS SYSTEM
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701
(512)499-4462

By: J. Robert Giddings

CERTIFICATE OF SERVICE

On this _____ day of _____, 198_____, a true copy of the foregoing pleading was mailed, with first-class postage prepaid, to:

Anthony D. Sheppard
One Greenway Plaza East
Suite 640
Houston, Texas 77046

W. Robert Brown
3900 Two Houston Center
Houston, Texas 77010

Kevin T. O'Hanlon
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711

Jeffrey A. Davis
3300 Allied Bank Plaza
Houston, Texas 77002

Jeff Horner
2900 Pennzoil Place
South Tower
Houston, Texas 77002

_____
Lucius Desha Bunton, Jr.

STATEMENT OF MAILING

On this day appeared before me, the undersigned Notary Public, Lucius Desha Bunton, Jr., who, being by me first duly sworn, stated as follows:

"My name is Lucius Desha Bunton, Jr. and I am a member of the Bar of the Supreme Court of the United States.

"Pursuant to Rule 28.2 of such Court, the foregoing Motion of Appellee University Interscholastic League to Dismiss or Affirm is being deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within 30 days of Appellee's receipt of Appellant's Jurisdictional Statement, on this ____ day of January, 1986."

_____
LUCIUS DESHA BUNTON, JR.

SWORN TO AND SUBSCRIBED before me on this _____ day of _____, 1986, to certify which witness my hand and seal of office.

_____
Notary Public in and for
the State of Texas

_____
Printed Name

My commission expires:

_____